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No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1961

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 17–29) is not yet reported. The Board's decision and order are reported at 127 NLRB 1629 (R. 382).[1]

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1961 (Pet. 30), and the decree enforcing the Board's order (as modified) was entered on June 28, 1961 (Pet. 2, 30). The petition for a writ of certiorari was filed on August 18, 1961. The

[1] "R" refers to the Joint Appendix filed with the court below.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the facts presented here, the Board properly found that the Union induced and encouraged *employees* to engage in *concerted* action, within the meaning of Section 8(b)(4) of the National Labor Relations Act, as it existed prior to its amendment in 1959.

2. Whether the Board properly held the International Union responsible for the unfair labor practices committed by its local unions.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pages 15–16 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. BACKGROUND

The Burt Manufacturing Company ("Burt") is engaged in the fabrication of sheet metal roof ventilators and wall louver equipment (R. 289; 19). In 1945, following an unsuccessful organizational effort by the petitioner Union,[2] the United Steelworkers of America, AFL–CIO was certified by the Board as the exclusive bargaining representative of Burt's production and maintenance employees; since that date,

[2] Petitioners are Sheet Metal Workers' International Association, AFL–CIO (herein called the "Association"), and its Locals 70, 65, and 98. The term "Union" refers to the Association and its affiliated locals.

the Steelworkers have continuously represented these employees (R. 290; 20).

All installation work relating to the type of equipment which Burt fabricates is performed by sheet metal contractors, who either purchase the equipment directly from the manufacturer or work on equipment supplied by the general contractor or industrial owner (R. 289; 19–20). The sheet metal contractors were members of contracting associations, and thus governed by contracts known as the Standard Form of Union Agreement ("SFUA"). The SFUA is a standardized contract form which petitioner Association furnishes to its locals pursuant to a constitutional provision expressing the "desirability of uniformity of local agreements, particularly with regard to certain basic conditions of employment" (R. 262, 266, 292–293). The first two articles of the SFUA (R. 292; 265–266) provide:

> ARTICLE I
>
> SECTION 1. This Agreement covers the rates of pay, rules and working conditions of all employees of the Employer engaged in the manufacture, fabrication, assembly, handling, erection, installation, dismantling, reconditioning, adjustment, alteration, repairing, and servicing of all ferrous or nonferrous sheet metal work of No. 10 U.S. gauge, and all other materials used in lieu thereof, all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches and all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

ARTICLE II

SECTION 1. The Employer agrees that none but journeymen sheet metal workers and registered apprentices shall be employed on any work described in Article I.

Article I of the SFUA conforms to the Association's constitution, which claims jurisdiction over, *inter alia*, "the manufacture, fabrication, assembling, [and] erection * * * of all sheet metal work made of No. Ten (10) U.S., its equivalent or lighter gauge metals * * *" (R. 254). The Union has construed these provisions as requiring contractors signatory to the SFUA to handle only sheet metal items fabricated either by their own employees or by employees of manufacturers under contract with the Union (R. 293; 218–219). In short, petitioners' policy has been to refuse to permit its members to install equipment which does not bear a "union label" (R. 193, 209–210, 219, 261). Sheet metal equipment manufactured by Burt has long fallen within the category of "non-Union" goods, under petitioners' definition (R. 340; 30–31, 166–167, 244, 261–262).

Following the Steelworkers' certification as the representative of Burt's employees in 1945, the Union embarked on a program of refusing to install Burt's products (R. 331, 334; 20–21, 34–35). Burt has frequently discussed this problem with representatives of the Steelworkers, the AFL–CIO, and the Union (R. 344; 34–35), but has been unable to resolve it.

Thus, in August 1956, after Local 98 refused to supply men to a construction job in Lima, Ohio, because Burt equipment was involved, F. C. Sawyer,

Burt's vice-president and sales manager, met in Washington, D.C. with Peter McGavin, assistant to the AFL–CIO president, and with officials of the Association (R. 336–337, 354–355; 25–26, 160–162). Robert Byron, the President of the Association, stated that he knew about Burt's problem, that if Burt wished to avoid a continuation of the product boycott it would have to transfer its employees from the Steelworkers to the Union, and that if Burt refused it "would continue to have trouble" (R. 337, 354–355; 26, 163). Byron then asked when Burt's current contract with the Steelworkers expired. When Sawyer replied that it would expire the following spring, Byron said, "Well, that is the time that you should take your men out of the Steel Workers and put them over into the Sheet Metal Workers" (R. 337, 354–355; 26–28). Sawyer pointed out that such conduct would violate the AFL–CIO's "no raiding" agreement, and accused the Union of "picking on" Burt. Byron replied that Burt was a quality and volume producer and that, if the Union could either obtain recognition or put Burt out of business, "it would be an example that he [Byron] could hold up to all of these other companies that were not organized by the Sheet Metal Union, * * * that they should also belong to the Sheet Metal Workers' Union" (R. 337–338, 354–355; 27). Byron added, "If you put your men into our union, * * * we will double your business for you" (R. 338, 354–355; 28, 164).

In late October 1956, Sawyer again visited McGavin and Association Secretary-Treasurer Carlough in Washington in an attempt to alleviate the product

boycott (R. 339–340; 29–30, 165–166). Carlough told Sawyer, "Well, if you want to get out of your problem if you want to get over your trouble, then you will have to take your men out of the Steel Workers and put them over into the Sheet Metal Workers." To Sawyer's rejoinder that the AFL–CIO constitution forbade such a transfer, Carlough retorted that the Union was standing on Articles I and II of the SFUA (R. 340, 354; 31–32, 166–168). On November 7, 1956, the Steelworkers President David MacDonald sent a letter to AFL–CIO President Meany, in which he noted the Union's longstanding product boycott against Burt, charged the Union with deliberately attempting to subvert the Steelworkers' representative status among Burt's employees, in violation of the AFL–CIO constitution, and requested a meeting of the Federation's Executive Council to take appropriate action (R. 341–343; 172–183).

On November 13, a meeting, attended by representatives of the AFL–CIO, the Union, and the Steelworkers, was held in Washington, in an attempt to adjust the differences between the two labor organizations (R. 343; 227–228, 243, 245). The Steelworkers asserted that the Union's boycott of Burt's products was causing members of the Steelworkers to lose work and that this conduct constituted a refusal to recognize the Steelworkers' certification. Byron and Carlough replied that they were merely insisting that the sheet metal contractors live up to the provisions of the SFUA and that, in any event, the wage rates paid by Burt, which were lower than those paid by manufacturers under contract with the Union, were hurting the Union's mem-

bers. When asked if the Union would be satisfied if the Steelworkers obtained the same wage rates for Burt's employees, Carlough replied in the negative, and stated that the Union would continue to insist that its contractors abide by the terms of SFUA (R. 343–344, 354; 148–151, 183–185, 228–229, 231, 244–246). The Union made clear its position that the only way to settle Burt's problem was for the Steelworkers to turn over its membership at that plant to the Union, and the meeting ended without agreement being reached (R. 345–346, 355; 246–247).

2. THE INDUCEMENT OF THE WOOSTER AND THE MANNEN AND ROTH EMPLOYEES

The Union carried out its boycott against Burt by exerting direct pressure upon various sheet metal contractors not to install Burt products,[5] and by induc-

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[5] Thus, in October 1956, Local 70 threatened that it would refuse to furnish men to any of Wooster's jobs, unless Wooster stopped installing ventilators and other equipment fabricated by Burt (R. 298–299; 43–48, 51–53, 276). In late 1956, and again in late 1957, Local 70 informed the Kasch Roofing Co. of the Association's instructions to the Local to "tighten up" with respect to the installation of products fabricated by "non-union" manufacturers. Local 70 threatened Kasch with cancellation of its contract unless Kasch ceased using Burt products (R. 301–303; 61–71, 201, 277–281). In mid-December 1957, Local 70 informed a committee of the Ohio Valley Sheet Metal and Roofers Association that their use of equipment manufactured by firms not under contract with the Union was a violation of the SFUA (R. 303; 102–115). When committee members explained that the use of Burt ventilators was necessitated by business considerations, Local 70 merely insisted that the members "live up to [their] agreement" (R. 303–304; 107–110, 112–113). In late 1957, Local 70 refused to furnish men on a project where Conditioned Air, Inc., proposed to install Burt ventilators and agreed to furnish men only if

ing the contractors' employees not to work on those products. The facts concerning the latter, revealed by the record, are as follows:

Early in 1957, during a discussion about the Ohio Bell job on which the Wooster Sheet Metal and Roofing Company was the sheet metal subcontractor, W. D. Frost, a business agent of Local 70, told Harry Liberman, one of Wooster's partners, not to install Burt ventilators on the job despite the specification of such ventilators in the subcontract (R. 311; 40). Shortly thereafter, Business Agent Lloyd Kenney of Local 70 visited another of Wooster's jobs, at which employee Frederick Wetshtein, a member of Local 70, was working. When Wetshtein asked Kenney about the Burt ventilators, "if we were supposed to install them or what the situation was on it," Kenney replied that "[he] wasn't sure. And, that anything that I wasn't sure about myself, just not to handle it, until you find out first" (R. 312; 53–55). Subsequently, Wetshtein went to work on the Ohio Bell job and was told to install Burt ventilators. He and another employee refused, on the ground that he "didn't want to get into any trouble" (R. 311; 49, 56). Wetshtein and another employee installed the ventilators only after Kenney had ac-

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the company installed ventilators which bore the Union label (R. 304–307; 77–99, 207–208, 213–214, 281–282). In June 1957, Local 98 refused permission to the Tri-State Roofing Company for the installation of Burt ventilators on a job, and Tri-State was forced to complete the job by installing ventilators manufactured by a company under contract with the Union (R. 309–310; 141–147, 284).

ceded to Liberman's request and had granted permission for the installation (R. 311; 41, 56).

Mannen and Roth Company is a Cleveland sheet metal contractor under contract with Local 65. Its SFUA-type contract requires foremen to be members of the Union (R. 313–314; 282–283). In October 1957, Clarence Desch, business agent of Local 65, visited a Mannen and Roth job at which Melvin Albert, the Company's outside foreman, and three mechanics were installing ventilators. Both Albert and the mechanics were members of Local 65. Upon learning that the ventilators had been manufactured by Burt, Desch told Albert not to install the ventilators until the latter heard from Desch. In compliance, Albert ceased the installation work and assigned the mechanics to another task. About a week later, Desch told Albert "to go ahead," whereupon Albert and the three mechanics completed the ventilator installation (R. 314; 115–119).

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Association, Local 70, Local 65, and their respective officers and agents, had induced and encouraged employees of neutral employers to engage in a concerted refusal to install Burt products, with an object of forcing or requiring these employers to cease using or handling such products and to cease doing business with Burt, in violation of Section 8(b)(4)(A) of the Act (R. 382–384). The Board further found that, in engaging in this conduct, petitioners also had the additional object of forcing or requiring Burt to rec-

ognize and bargain with Local 70,[4] although that labor organization had not been certified as the representative of Burt's employees and although another labor organization had been so certified. Accordingly, the Board found that the petitioners also violated Sections 8(b)(4)(B) and 8(b)(4)(C) of the Act (R. 384). The Board's order directed petitioners and their respective officers and agents to cease and desist from the unfair labor practices found, and to post appropriate notices (R. 387–389).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, with modifications not material here, enforced the Board's order (Pet. 17–29). The court (Judges Edgerton, Prettyman and Bazelon) agreed with the Board that the Union's inducement of Wetshtein and of Albert constituted, in the circumstances here, the kind of inducement of employees to engage in concerted activities for a proscribed object which was barred by Section 8(b)(4)

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[4] Local 70, whose geographic jurisdiction encompasses parts of Ohio and West Virginia, is the only local with jurisdiction to represent Burt's employees (R. 290–291; 195).

[5] The Board, two members dissenting, also found that, by the above-described conduct and the direct pressure on contractors (see note 3, *supra*), the Union violated Section 8(b)(2) of the Act because it was seeking to force Burt not only to recognize the Union but to execute a union-security contract with it, which would have forced Burt to discriminate against its employees, all of whom were members of the Steelworkers (R. 384–386). The court of appeals denied enforcement of this portion of the Board's order, holding that the evidence was insufficient to warrant the inference drawn by the Board that the Union wanted not only recognition but also a contract containing a union-security clause (Pet. 26–27). This matter is not at issue here.

of the Act (Pet. 18–21). The court further held that the Association was responsible for the acts of its locals, in view of its policy regarding the "product boycott" and its constitutional requirements that the locals carry out its policies (Pet. 27–29).

ARGUMENT

1. Petitioners do not challenge the finding that they have long engaged in a product boycott against Burt, and that this boycott policy was the reason for the refusals to handle or install Burt products. Nor do petitioners challenge the findings that an object of their conduct was to force the contractors to cease doing business with Burt, in violation of Section 8(b)(4)(A) of the Act, and also to force Burt to recognize and bargain with Local 70 despite the Board certification in favor of the Steelworkers, contrary to Section 8(b)(4)(B) and (C). Petitioners seek to avoid liability on the narrow ground that they did not further these illegal objectives by the particular means proscribed by Section 8(b)(4), as it existed during the events in this case. That is, they contend that they did not induce *employees* to engage in a *concerted* refusal to handle Burt products—since in the Wooster incident, Business Agent Kenney spoke only to one employee, Wetshtein, and, in the Mannen and Roth incident, Business Agent Desch did not induce any employees but spoke only to their foreman (Pet. 2–3, 10, 11–13). Neither phase of this contention raises a question warranting review by this Court.

The question whether the union's actions here induced "employees" to engage in a "concerted re-

fusal" to handle or work on any goods, within the meaning of Section 8(b)(4) as it previously existed (Pet. 15), turns on the particular facts of this case. Moreover, the issue has little significance for the future, since the 1959 amendments to the Act have deleted those requirements. The present provision (Section 8(b)(4)(i)),[6] by substituting the term "individual" for "employees" and eliminating the requirement of "concerted refusal," makes it clear that the inducement of a single employee, even a minor supervisor like a foreman, is prohibited if done in furtherance of any of the proscribed objectives.[7]

In any event, the record fully supports the findings of the Board, sustained by the court below, that the Union induced employees of neutral employers to engage in concerted refusals to handle Burt's products. As to the Wooster incident, while Business Agent Kenney spoke only to employee Wetshtein, the latter was a union member, and as such was obligated to promote the Association's avowed policy of effectuating a boycott of Burt's products. The demand was made at the job where he was working and the

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[6] Section 8(b)(4)(i) (73 Stat. 542, 29 U.S.C., Supp. II, 158(b)(4)(i)) makes it an unfair labor practice for a labor organization: "to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; * * *."

[7] See 105 Cong. Rec. 16589, II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O., 1959) 1707.

work was customarily done by two or more employees.[8] Finally, as the Board observed (R. 383), the "demand was obviously intended to be transmitted to all other employees who might be called on to install Burt products." In these circumstances, "It would be artificial to say that the Union did not encourage a unity of effort, and therefore concerted action, on the part of the employees." *Amalgamated Meat Cutters* v. *National Labor Relations Board* 237 F. 2d 20, 24 (C.A. D.C.), certiorari denied, 352 U.S. 1015. Accord: *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters,* 242 F. 2d 932, 935 (C.A. 6); *American Federation of Radio Artists* v. *Getreu,* 258 F. 2d 698, 701 (C.A. 6).[9]

[8] The record shows that two employees, Wetshtein and Pickett, were ordered to install the Burt ventilators, but both refused (R. 311; 49). Moreover, when the job was ultimately cleared by the Union, two employees, Wetshtein and Miller, were required to perform the installation (R. 311; 250).

[9] The cases relied on by petitioners (Pet. 10, 11) are distinguishable on their facts. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, involved a single act of inducement, which was but an incident of lawful picketing conducted at the primary employer's plant; here, on the other hand, the inducements took place at the job sites of neutral employers and their purpose was to obtain unified adherence by the neutrals' employees to the Union boycott against Burt's products. *Joliet Contractors' Association* v. *National Labor Relations Board*, 202 F. 2d 606 (C.A. 7), certiorari denied, 346 U.S. 824, and *National Labor Relations Board* v. *Brewery Workers*, 272 F. 2d 817 (C.A. 10), did involve inducement at the premises of neutral employers. But in those cases, unlike here, the courts were of the view that the record before them did not warrant the inference that the single employee induced was intended, or would be likely, to transmit the Union's request to fellow employees and thus effect a refusal more widespread than that of the employee immediately involved.

Similarly, in the Mannen and Roth incident, the facts detailed in the Statement show that Business Agent Desch visited a job at which foreman Albert and three mechanics, all of whom were Union members, were working, and told Albert not to install Burt ventilators. In compliance, Albert ceased the installation work and assigned the mechanics to another task. Only when Desch told Albert "to go ahead" was the installation completed. Since the Association's constitution provided for the fining, suspension or explusion of any member who "wilfully violat[es] the recognized and established union agreements, rules and regulations * * * relating to rates of pay and working conditions" (R. 260), Desch's statement to Albert to cease installation of Burt ventilators could properly be regarded, not as a mere request to a company representative to abide by the Union's interpretation of the SFUA, but as an appeal to Albert, in his capacity as a Union member, to carry out his obligation to uphold the Union's working rules and to effectuate the product boycott. Accordingly, the Board was justified in concluding that, when Albert, upon learning that the Burt products were nonunion, promptly quit work and ordered the mechanics to do so, he was acting, not as a management representative, but as a medium of transmission for the Union's orders to its members in Mannen and Roth's employ.[10]

[10] Since the above facts, as to both incidents, show that, for a time at least, the employees stopped work on Burt equipment, petitioners can hardly claim (Pet. 13) that no actual refusal to work occurred. At any rate, whether or not a work stoppage resulted from the Union's action is immaterial, as it "is

2. Petitioners' contention (Pet. 3, 8–11) that the Association was improperly held responsible for the unfair labor practices committed by representatives of the local unions also presents on this record a factual issue which does not warrant review by this Court. In any event, the facts detailed in the Statement amply support the Board's finding in this regard.

Thus, the Local's business representatives were acting in implementation of the Association's jurisdictional claims (R. 257); these claims were required, by the Association's constitution, to be incorporated into all Union agreements (R. 262–264); and the constitution granted to the Association president the "direction and supervision of all local unions" and the authority to suspend a local or any of its officers or representatives for "fail[ing] to comply with the provisions of this Constitution" (R. 254–256). Further, the Association was in the midst of a nationwide campaign to organize the employees of sheet metal fabricators, and in conjunction therewith omitted Burt's name from its "fair list." The Association was well aware of the effect of its product boycott on Burt, and, indeed, both Byron and Carlough, the Association's highest officials, specifically informed Burt that it would continue to have trouble unless it transferred

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sufficient if [the unions] *induce or encourage concerted* conduct by the employees of a neutral employer to engage in * * * a strike, although they may fail in their efforts." *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 193 F. 2d 421, 424 (C.A. 10). See also *Highway Truck Drivers, Local 107* v. *National Labor Relations Board*, 273 F. 2d 815, 818 (C.A. D.C.); *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900, 904 (C.A. 2), certiorari denied, 351 U.S. 962.

its employees from the Steelworkers to the Union. In the light of these facts, the Association, under settled principles of agency, was properly held responsible for the actions of its Locals. See Section 2(13) of the Act (Pet. 15); *National Labor Relations Board* v. *International Longshoremen's Union,* 210 F. 2d 581, 584–585 (C.A. 9); *Selby-Battersby and Company* v. *National Labor Relations Board,* 259 F. 2d 151, 157 (C.A. 4), certiorari denied, 359 U.S. 952; *National Labor Relations Board* v. *Millwrights' Local 2232,* 277 F. 2d 217, 220–222 (C.A. 5).[11]

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[11] This conclusion is not inconsistent with either *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, or *Coronado Coal Company* v. *United Mine Workers*, 268 U.S. 295 (Pet. 9). In these cases, the International was held not liable for the effects of a purely local strike called by a district organization and its locals since there, unlike here, it "was [not] shown by any substantial evidence to have initiated, participated in or ratified the interference with plaintiffs' business * * *" (259 U.S. at 393). Further, in those cases, unlike here, the participation of the International would have been contrary to specific provisions of the International Constitution. Similarly distinguishable on their facts are *United Brotherhood of Carpenters* v. *National Labor Relations Board*, 286 F. 2d 533 (C.A. D.C.), and *National Labor Relations Board* v. *International Longshoremen's Union*, 283 F. 2d 558 (C.A. 9) (Pet. 10–11). In the *Carpenters* case, the Brotherhood was absolved from liability since there was no showing that the Brotherhood's approval of the local unions' rules imposed any requirement or mandate on the locals, nor did the evidence show a nationwide campaign to compel the employer to recognize the u n. In the *Longshoremen's* case, the local union stewards aused employers to discriminate against an employee who had instituted a lawsuit against the local. The court held the local responsible, but absolved the International from liability since there was no evidence of connections between the International and the Local other than the International's negotiation and execution of the master bargaining agreement for its local unions. Finally,

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1961.

International Ladies' Garment Workers' Union v. *National Labor Relations Board*, 237 F. 2d 545 (C.A. D.C.) (Pet. 9) is totally inapposite. The issue there was simply whether the Board could deny reinstatement to striking employees who did not directly or indirectly participate in, authorize, or ratify strike misconduct.

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